IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF COLORADO

In re:	:	
	:	
KAISER STEEL CORPORATION,	:	Bankruptcy No. 87 B 01552 E
	:	(Jointly Administered)
Debtor.	:	

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM AUTOMATIC STAY, OR IN THE ALTERNATIVE FOR ADEQUATE PROTECTION AND REQUEST FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE CLAIMS

Movants, the State of Utah Division of Oil, Gas and Mining ("Division") and the United States Office of Surface Mining Reclamation and Enforcement ("OSMRE"), by and through their undersigned attorneys, hereby submit this Memorandum in support of their previously filed Motion for Relief from Automatic Stay, or in the Alternative for Adequate Protection and Request for Allowance and Payment of Administrative Claims ("Motion").

I. ISSUES PRESENTED

A. WHETHER THE MOVANTS ARE SUBJECT TO AUTOMATIC STAY PROVISIONS OF 11 U.S.C. § 362(a) WHEN TAKING ACTION TO ENFORCE ENVIRONMENTAL PROTECTION LAWS.

B. WHETHER DEBTOR IS IN VIOLATION OF 28 U.S.C. § 959(b) FOR FAILING TO OPERATE THE SUNNYSIDE MINE IN ACCORDANCE WITH STATE LAW.

C. WHETHER MOVANTS PROPOSED ACTIONS TO ORDER CESSATION OF OPERATIONS AND INITIATION OF COMPLETE RECLAMATION AT THE UTAH PROPERTIES CONSTITUTES DISCRIMINATION AS CONTEMPLATED BY 11 U.S.C. § 525.

II. BACKGROUND

A. History of the Obligation to Reclaim. In 1977, Congress enacted the Surface Mining Control and Reclamation Act ("SMCRA"). This statute was intended to form the basis for a nationwide regulatory scheme designed to control the adverse effects that surface and underground mining had upon the environment. Built into SMCRA were provisions for each state to assume exclusive jurisdiction over the regulation of nonfederal coal mining operations and cooperative regulation with OSMRE of operations on federal lands.

The State of Utah, in 1975, enacted the Utah Mined Land Reclamation Act, § 40-8-1 et seq., Utah Code Annotated (1953, as amended) and in 1979, enacted the Coal Mining and Reclamation Act ("CMRA"), § 40-10-1 et seq., U.C.A. (collectively referred to herein as the "Utah Acts"), the latter being closely patterned after SMCRA. In 1981, the State received approval from OSMRE to exercise exclusive jurisdiction to enforce the Utah Acts and resultant rules over coal mining operations on nonfederal lands within the State. Cooperative jurisdiction with OSMRE over coal mining operations on federal lands within the State was achieved by agreement between the Division and OSMRE, effective March 13, 1987.

The purpose of this regulatory focus is to assure that coal mining operations are "...conducted so as to protect the

environment, that reclamation occurs as contemporaneously as possible with the operations, and that operations are not conducted where reclamation as required by [CMRA] is not economically or technologically feasible." (§ 40-10-2(3), U.C.A.; corresponding federal citation is 30 U.S.C. § 1202).

To this end, those seeking to conduct coal mining operations must meet statutorily imposed standards for environmental protection during both the operation and the reclamation phases of the mining endeavor. Every entity, be it an individual, corporation, partnership, or the like, both public and private, must meet the stated standards or risk imposition of a civil penalty or an ordered cessation of operations. In addition, in order to assure that operations are conducted to make restoration of the disturbed area feasible and to assure that restoration of the site becomes a reality, no coal mining operation may commence or continue operations without posting a reclamation surety with the Division, § 40-10-15(1); UMC 800.11, §40-8-14(1). The amount of the surety is based upon the cost of completing the reclamation plan submitted by the applicant for a coal mining permit.

B. Debtor's Reclamation Obligation. Kaiser Coal of Utah, Kaiser Coal of Sunnyside, Kaiser Steel Corp., ("Kaiser"), is the owner of three coal properties in the State of Utah, the Sunnyside Mine, the Geneva Horse Canyon Mine, and the Wellington Preparation Plant ("Utah Properties"). Kaiser has operated the Sunnyside Mine in Carbon County, Utah since 1943 with the reclamation obligation accruing in 1975 with the passage of the Utah Mined Land Reclamation Act, supra.

In early 1985, pursuant to an asset purchase and sale agreement between U.S. Steel Corporation (now USX) and Kaiser Steel Corporation and a permit transfer agreement between the Division and Kaiser Steel Corporation, Kaiser assumed the obligation to reclaim the Geneva (Horse Canyon) Mine. Similar agreements were executed in early 1986 between the Division, Kaiser Steel Corporation and U.S. Steel Corporation resulting in Kaiser's assumption of the reclamation obligation for the Wellington Preparation Plant.

In each instance, Kaiser submitted a proposed plan for operation and reclamation for each of the Utah Properties including an estimated cost to carry out the reclamation activities as proposed. After review and any necessary modifications to the plan and resultant costs of implementation, the plan and bond amount were approved by the Division.

Reclamation costs were calculated on the basis of general categories including, but not limited to, the following:

Building Demolition Costs
Mine Sealing (Portal Closure)
Regrading and Backfilling
Revegetation
Monitoring and Maintenance following initial completion of reclamation
Project Management

Kaiser requested that the Division accept a self-bond for each of the three Utah Properties. At the time of each request, Kaiser Coal Corporation met the net capital rule of UMC 800.23(B0(3) and, pursuant to its authority under UMC 800.12, the Division allowed the three self-bonds.

Subsequently, on February 11, 1987, Kaiser Steel Corporation, and on February 13, 1987, Kaiser Coal Corporation, petitioned for protection under Chapter 11 of the Bankruptcy Code. Then, on March 25, 1987, pursuant to UMC 800.23(G), Kaiser Coal Corporation notified the Division that Kaiser Coal no longer met the necessary criteria for self-bonding. (Attachment 4 of the Motion.) The Division responded by letter dated March 26, 1987, directing Kaiser to post an alternate form of bond within 90 days or cease coal extraction and begin reclamation operations. (Attachment 5 of the Motion).

Kaiser has not posted an alternate bond but continues to operate the Sunnyside Mine. Kaiser has not initiated activities intended to completely reclaim the Utah Properties.

III. ARGUMENT

A. PURSUANT TO 11 U.S.C. § 362(b)(4) AND (5), ACTIONS BY THE STATE OF UTAH TO ENFORCE ITS COAL MINING AND RECLAMATION LAWS ARE NOT SUBJECT TO THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. § 362(a).

Kaiser contends that Movants are attempting to recover on a claim against Debtor that arose before the commencement of these bankruptcy proceedings. To the extent that Movants seek to assure reclamation of the Utah Properties through entry and enforcement of an injunction, even though the injunction requires the expenditure of money, Movants are excepted from the automatic stay provisions of § 362(a) of the Bankruptcy Code.

Section 362(a) provides, in pertinent part, as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed

> under section 301,302, or 303 of this title..., operates as a stay, applicable to all entities, of-
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;....

The relevant exceptions to § 362(a), as listed in §362(b), provide that:

> (b) The filing of a petition under section 301, 302, or 303 of this title..., does not operate as a stay-
>
> > (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
> >
> > (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other that a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;....

The leading case in the area of governmental enforcement of coal mine reclamation laws is Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267 (CA3, 1984). In Penn Terra, the Pennsylvania Department of Environmental Resources ("DER") obtained an injunction directing Penn Terra to reclaim certain coal mines by backfilling, grading and by other means of restoring the mined site. Id. at 270 n. 3. Penn Terra

had previously filed a petition for bankruptcy under Chapter 7 and the bankruptcy court and the district court had held that, since the debtor was insolvent and had no real means to comply with the direction to reclaim, the State was merely attempting to collect a money judgment against the debtor in violation of §362(b)(5) thereby exhausting the debtor's assets. Id. at 270.

On review, the Court of Appeals evaluated whether DER's actions in enforcing Pennsylvania's police or regulatory powers fell within the § 364(b)(4) exemption and, if so, whether the Commonwealth Court injunction directing the initiation of reclamation activities constituted the enforcement of a money judgment thus being prohibited through the operation of 362(b)(5). The Court reversed the bankruptcy court and the district court finding that the "...actions taken by DER in obtaining and attempting to enforce the...injunction falls [sic] squarely within Pennsylvania's police and regulatory powers." Id. at 274. In support of its findings, the Court cited the legislative history for subsection 362(b)(4):

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.
> (Emphasis by the Court.)
> Id. at 272.

The Court concluded that "...both the Senate and the House committee reports on the Bankruptcy Reform Act explicitly

acknowledge environmental protection as a part of the State's police power. Id. at 274.

Subsection 362(b)(5), the Court went on to explain, creates an "...'exception to the exception,' in that actions to enforce money judgments are affected by the automatic stay, even if they otherwise were in furtherance of the State's police powers." Id. at 272. That finding is supported by the legislative history for that subsection:

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a government unit of a money judgment would give it preferential treatment to the detriment of all other creditor.
> Id. at 272.

It is clear that an "...important factor in identifying a proceeding as one to enforce a money judgment is whether the remedy would compensate for past wrongful acts resulting in injuries already suffered, or protect against potential future harm." Id. at 277.

Kaiser characterizes its obligation to remove structures, seal mine openings, backfill, revegetate, control erosion and conduct other reclamation activities as simply a claim that arose prior to the commencement of these bankruptcy proceedings. It contends therefore, that Movants, in attempting to enforce the reclamation obligation, seek to enforce a money

judgment in violation of the "exception to the exception" of § 362(b)(5).

In addressing that very question, however, the Penn Terra Court, when faced with a remarkably similar reclamation obligation, opined that:

> "...the mere payment of money, without more, even if it could be estimated, could not satisfy the Commonwealth Court's direction to complete the backfilling, to update erosion plans, to seal mine openings, to spread topsoil, and to implement plans for erosion and sedimentation control. Rather, the Commonwealth Court's injunction was meant to prevent future harm to, and to restore, the environment.
> Id. at 278.

Movants seek no compensation for injuries already suffered. Movants single-minded purpose in appearing before this Court is to take the steps necessary to enforce Kaiser's obligation to restore the disturbed areas of the Utah Properties to a "...condition capable of supporting the uses which it was capable of supporting prior to any mining." § 40-10-17(2)(b), U.C.A.; 30 U.S.C. § 1265(b)(2)).

In United State v. F.E. Gregory & Sons, Inc., 58 B.R. 590 (W.D.Pa. 1986), another case with facts quite similar to those in the case now before this Court, a debtor who had performed coal mining operations on leased land in Pennsylvania filed a voluntary petition for bankruptcy under Chapter 11 of the Code. Two months later, the plaintiff filed a complaint seeking

an injunction ordering debtor to perform reclamation work at the then abandoned mine site. Id. at 591. Debtor contended that an injunction directing expenditures of funds from the bankruptcy estate was the same as imposing a monetary judgment.

The Gregory Court disagreed citing Penn Terra for the principle that this type of restoration of the land disturbed by coal mining operations is calculated to prevent future harm and not to compensate for past injuries. As a result, the Court found that plaintiff's injunction seeking to enforce the reclamation requirements of SMCRA fell within the 362(b)(4) exemption for regulatory actions and that, although the expenditure of assets was required, such was not an enforcement of a money judgment.

In addition to following Penn Terra, the Court, in Gregory, distinguished the United States Supreme Court decision in Ohio v. Kovacs, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). The Kovacs Court had determined that the debtor's obligation to "...clean up a hazardous waste site pursuant to a state court judgment order was a "debt" or "liability on a claim" dischargeable in bankruptcy." Gregory, supra, at 592. In that case, however, the state action in having a receiver appointed "...disabled Kovacs 'from personally taking charge of and carrying out the removal of wastes from the property.'" Id. at 592 citing Kovacs at 105 S.Ct. 710. The only performance

required from Kovacs, then, was the payment of money, "...presumably out of his post-bankruptcy income. In light of these circumstances, the Court's conclusion that the cleanup order had been converted into an obligation to pay money is not surprising." Gregory, supra, at 592.

The Kovacs case is clearly distinguishable from the facts in the current proceedings. Here, Kaiser has filed for protection under Chapter 11 and remains in possession of the Utah Properties. No receiver has been appointed. The entity possessing the obligation to protect the Utah Properties from future harm is the same entity possessing the Utah Properties.

The Penn Terra decision was again followed in a United States District Court for the District of Colorado case captioned United States v. Standard Metals Corp., 49 B.R. 623 (D.Colo. 1985). In that case, the United States sought enforcement of a stipulated penalty for violation of the Clean Waters Act, 33 U.S.C. 1251 et seq.

The Court found that:

> Environmental laws are enforced in a variety of ways. The Third circuit held in Penn Terra...that an action to enjoin the operator of a coal mine to correct violations of state environmental protection statutes came within the police powers exception, 362(b)(4). Section 362(b)(5) makes it clear that a court may both enter and enforce an injunction obtained in a regulatory enforcement action, even though the injunction will require the debtor to

> spend money in order to remedy the problem.
> Id. at 625.

In assessing the deterrence function of the stipulated fine, the Court stated:

> If one in a precarious financial condition knows that any action to assess a fine will be stayed by filing for bankruptcy, he will have little incentive to guard against environmental pollution. The public's safety, health and welfare would be placed in jeopardy by eliminating the practical deterrent of the fine in those circumstances. It is the purpose to prevent endangerment of the public that would result from permitting a bankrupt to avoid statutes and regulations enacted in furtherance of governmental police powers.
> Id. at 625.

The Court found that, although the stipulation and plaintiff's demand for payment had occurred prior to the debtor's petition for bankruptcy under Chapter 11, the governmental action to enforce its environmental protection laws "... falls within the ambit of § 362(b)(4)." Id. at 625. As a result, the debtor's request to have the Court declare the government's action subject to the automatic stay was denied.

Although the Standard Metals decision followed the holding in Penn Terra, such was not the case in the recent Sixth Circuit decision of United States V. Whizco, Inc., No. 87-5317, Slip Op. (6th Cir. March 7, 1988). In Whizco, a three judge panel ruled that an individual who had been granted a routine

discharge under Chapter 7 of the Bankruptcy code was thereby immune from a mandatory reclamation injunction under 30 U.S.C. §1271(c) because enforcement of the judgment would necessitate the payment of money by the individual.

In Whizco, the Court ruled that the government could not enforce the debtor's reclamation obligation following his discharge under Chapter 7. The Court did not rule on the issue presented in this case, which is whether the government's enforcement of the reclamation obligation is exempt from the automatic stay under the police or regulatory power exception of §362 (b)(4). Moreover, the Court in Whizco concluded that, following the liquidation of the debtor's estate, the debtor did not have "the physical capacity to reclaim the mine site himself, and that he would have to hire others to perform the work for him." Slip Op. at 8. The Court noted that defendant Whizco lacked the capacity to hire others to perform the reclamation. Such incapacity to perform reclamation does not exist, however, with respect to Kaiser. On the contrary, Kaiser has the machinery and personnel to perform the required reclamation and is presently utilizing those resources to remove coal from the Sunnyside Mine. Kaiser has not received a discharge under Chapter 7, has not received approval of a reorganization plan, nor has the case been converted to a Chapter 7 proceeding. Given all of the above, it is clear that the government's action is not affected by the decision in Whizco.

Even if the decision in Whizco were applicable to this case, the Sixth Circuit's decision is wrong on its face and contrary to established precedent within that Circuit and elsewhere. It is remarkable that the court equated the government's request for equitable injunctive relief with a monetary claim merely because compliance with the injunction would require the expenditure of some funds. As discussed above in Penn Terra, supra, the Third Circuit explicitly rejected the notion that simply because an injunction action will require the debtor to expend funds, that action is, in actuality, one to enforce a money judgment. 733 F.2d at 277-78. In rejecting that notion, the Court recognized that "in contemporary times, almost everything costs something." Id. at 278. The Court further commented that "an injunction which does not compel some expenditure or loss of monies may often be an effective nullity." Id.

The above language and ruling in Penn Terra has been quoted with approval and followed expressly by courts in three other circuits, including the Sixth. In matter of Commonwealth Oil Refining Co., 805 F.2d 1175, 1187 (5th Cir. 1986), the Fifth Circuit held that an EPA administrative action to compel a hazardous waste operator to reclaim a waste disposal site was "an action to compel compliance with federal and state environmental law," which did not seek "the entry of a money judgment or the

adjudication of liability for a sum certain." Accordingly, the Court held that the government's action was exempt from the automatic stay by virtue of §362(b)(4), even though reclamation of the site would require the expenditure of funds. In Cournover v. Town of Lincoln, 790 F.2d 971, 976 (1st Cir. 1986), the Court followed Penn Terra in upholding and action by a municipality to enforce its zoning regulations and require the removal of used truck parts from debtor's land. Finally, in NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 943 (6th Cir. 1986), the Sixth Circuit found the Penn Terra analysis of the police power exception "persuasive" and further concluded that only attempts to enforce money judgments are subject to the automatic stay.

The Sixth Circuit's decision in Whizco fails to even cite the decision in Penn Terra or discuss or distinguish the prior Sixth Circuit precedent in NLRB v. Edward Cooper, supra, affirming the ruling in Penn Terra. As such, the Whizco decision is an anomaly and should not be followed by this Court. To rule in accordance with the holding in Whizco would effectively write the police power exemption to the automatic stay out of existence. This would be inconsistent with the implicit notion in 28 U.S.C. §959(b) that "the goals of the Federal bankruptcy laws, including rehabilitation of the debtor, do not authorize the transgression of state laws setting requirements for the

> focused on the policy of the Bankruptcy Code of aiding the rehabilitation of the debtor and providing a fresh start. These courts have construed 525 would liberally to preclude actions that would frustrate this policy. See e.g. In re Sudler, 71 B.R. 780, 786-87 (Bankr. E.D. Pa. 1987); In re Hopkins, 66 B.R. 828, 833-34 (Bankr. W.D. Ark. 1986); In re Elsinore Shore Associates, 66 B.R. 723, 740-43 (Bankr. D. N.J. 1986); Matter of Holder, 40 B.R. 847, 850 (Bankr. E.D. Wis. 1984); In re Rath Packing Co., 35 B.R. 615, 620 (Bankr. N.D. Iowa 1983).
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> The better approach is taken by other courts that have focused on the specific language of the section, and have read the legislative history more narrowly. (Emphasis supplied.)
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> * * *

Kaiser's reliance upon 525(a) of the Code is further misplaced, because the mere fact that a governmental entity takes action by reason of a Debtor's inability to comply with financial requirements prescribed by law does not in and of itself violate the provisions of 525(a). The legislative history underlying 525(a) makes it clear that it was not the intent of Congress to prohibit such action if applied uniformly against debtors and non-debtors alike. Senate Report 95-989, 95th Cong. 2d Sess. 81 (1978) provides in pertinent part:

> The prohibition extends only to discrimination or other action based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the Perez situation). It does not prohibit consideration of other factors, such as future financial responsi-

The better reasoned authority reads 525(a) narrowly and restricts its application to the specific situations recited therein. In re Exquisito Services, Inc., 823 F.2d 151, 153 (5th Cir. 1987); In re Goldrich, 771 F.2d 28 (2d Cir. 1985); In re Rees, 61 B.R. 114 (Bkrtcy D. Utah 1986). In an exhaustive review of the law and legislative history of 525(a), the Bankruptcy Court for the District of Utah in Rees, held that the imposition on a debtor by the Wyoming Employment Security Commission of a higher tax rate by reason of debtor's failure to pay pre-petition employment security taxes did not violate the provisions of 525(a). The Court emphasized the fact that bankruptcy courts have generally interpreted 525(a) expansively without careful consideration of its legislative history, whereas appellate courts have tended to interpret 525(a) more narrowly. Judge Clark in Rees, after his review of the cases and the legislative history, concluded that the latter approach is the proper approach, holding that the imposition of a higher tax rate is not the denial of, revocation of, or refusal to renew a license, permit or other similar grant to the debtor.

This view was reaffirmed by the Court of Appeals for the Fifth Circuit in the recent case of In re Exquisito Services, Inc., 823 F.2d 151, 153-4 (5th Cir. 1987), where the court stated as follows:

> Courts have followed two approaches in delimiting the scope of § 525. Some have

current liabilities was less than the minimum ratio of 1.2 times required by Utah Rule UMC 800.23B(iii). See Kaiser's letter to the Division of March 25, 1987, with accompanying balance sheet, annexed to Applicant's Motion as Attachment 4. Indeed the balance sheet for the "coal group" reflects a book value of assets in excess of debts of $328,030,000.00, with a ratio of total liabilities to net worth of 0.4 times - well below the 2.5 times ratio required by the Rule. Kaiser's letter further represented that the December 31, 1986 balance sheets "... will, when completed, also reflect compliance with" the requirement that Kaiser's ratio of total liabilities to net worth would be 2.5 times or less. Clearly, the government's efforts to enforce regulations designed to protect society and the environment from the adverse effects of surface coal mining operations does not constitute discrimination against Kaiser by reason of "insolvency."

Moreover, Kaiser's claim that the applicants seek to discriminate against debtor merely because of its failure to pay a "debt that is dischargeable" is equally without merit. As argued extensively in this brief, the applicants do not seek to enforce payment of a claim dischargeable in bankruptcy, but to compel the reclamation of a mine site through the equitable enforcement powers set forth in valid, police power statutes and regulations.

Kaiser contends that the Division and OSMRE, the Applicants herein, seek to "... revoke, suspend, or refuse to renew Kaiser's permits solely because Kaiser is a Debtor under Title 11, Kaiser was insolvent before the commencement of these bankruptcy proceedings, Kaiser has been insolvent during the proceedings, and/or Kaiser has not paid a debt that is dischargeable," in violation of 11 U.S.C. § 525(a) ("525(a)").

These allegations are without merit because the applicants do not seek to "revoke" or "suspend" Kaiser's permits; Kaiser was not "insolvent"; and Kaiser's obligation to reclaim is not a "debt that is dischargeable." Applicant's proposed enforcement action is to require the debtor to comply with regulations which are applicable to any person engaged in surface coal mining operations. These regulations set forth a fundamental requirement applicable to all operators of coal mines, i.e., the posting of a bond adequate to assure the reclamation of the mine sites in question. Pursuant to that same regulation, if an operator does not have sufficient bond coverage and fails to secure replacement bond coverage within 90 days following notification by the appropriate state regulatory authority, (as was the case here), the operator must cease coal removal operations and begin reclamation activities. An adequate substitute bond was required, not because Kaiser was "insolvent", but because, by its own admission, its ratio of current assets to

Attachment 4 to Plaintiff's Motion), that Kaiser no longer meets the criteria for financial solvency necessary to be self-bonded. Further, Kaiser has not provided the alternative surety requested by the Division in its March 26, 1987 letter to Kaiser (attached as Attachment 5 to Plaintiff's Motion), a fact admitted by Kaiser in paragraph 3 of its Response to Motion for Relief from Automatic Stay, or in the Alternative for Adequate Protection and Request for Allowance and Payment of Administrative Claims. Neither has Kaiser ceased all operations and initiated reclamation activities as directed by the Division's March 26, 1987 letter to Kaiser.

Debtor's failure to comply with the requirement to maintain adequate surety throughout the term of the coal mining operation while continuing to operate the Sunnyside Mine is a violation of the statutes and rules of the State of Utah and, therefore, Debtor is not operating the "...property in his possession...according to the requirements of the valid laws of the State...in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b).

C. A STATE OR FEDERAL ACTION TO REVOKE, SUSPEND, OR REFUSE TO RENEW DEBTOR'S PERMIT TO CONDUCT COAL MINING OPERATIONS DOES NOT VIOLATE 11 U.S.C. 525(a).

in direct opposition to the intention of Congress in enacting SMCRA.

The holding in Penn Terra which was given tacit approval by the United States Supreme Court in Kovacs, 83 L.Ed.2d. 658, note 11, has been accepted by the United States District Court for Colorado in Standard Metals. This Court should follow that decision and find that Movants are not subject to the automatic stay provisions of § 362(a).

B. PURSUANT TO 28 U.S.C. § 959(b), DEBTOR MUST OPERATE THE UTAH PROPERTIES IN ACCORDANCE WITH STATE AND FEDERAL LAWS.

Although Kaiser has admitted that it no longer meets the criteria for self-bonding for the reclamation obligation for the Utah Properties, Kaiser continues to extract and sell coal from the Sunnyside Mine in derogation of § 40-10-15 and 40-8-14 U.C.A. and Rule UMC 800.23 (G) of the Utah Coal Mining and Reclamation Program, Chapter I: Rules Pertaining to Underground Coal Mining Activities (Rev'd 5/87) ("Rules"). It is a fact that Kaiser did, at one time, meet the criteria for financial solvency contemplated by § 40-10-15(3) and UMC 800.23 and, as a result, the guarantee of Kaiser Steel Corporation was accepted as a self-bond for the Utah Properties. It is also a fact, admitted by Kaiser in its March 25, 1987 letter to Dianne R. Nielson, Director of the Division of Oil, Gas and Mining (attached as

passed, Congress had a great deal of experience with the benefits to the public and the costs to industry of environmental protection. Several such laws were in place including the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq.; the Resource Conservation and Recovery and the Toxic Substances Control Acts of 1976, 42 U.S.C. 6921, et seq. and 15 U.S.C. § 2601, et seq., respectively; the Clean Air and Clean Water Acts of 1977, 42 U.S.C. § 7401, et seq., and 33 U.S.C. 1251, et seq., respectively, and especially the Surface Mining Control and Reclamation Act of 1977, supra. Even with the understanding of the costs, Congress inserted the exception for governmental enforcement of those environmental statutes through entry and enforcement of an injunction. Even with the understanding that an injunction directed at environmental protection necessarily costs money, Congress limited the government only in the enforcement of a money judgment not in the enforcement of an injunction.

For this Court to hold that Movants are stayed by the operation of § 362(a) from enforcing the reclamation obligation is, in a very real sense, to hold that Kaiser may reap considerable profit from the subject lands by extracting a non-renewable natural resource and then walk away leaving substantially depleted and therefore worthless properties which will remain as a moonscape for decades. Such a holding would be

operation" of debtor's business. Matter of Quanta Resources Corp., 739 F.2d 912,919 (3rd Cir. 1984). Equating Movant's enforcement action with a monetary claim would defeat the purpose of the police power exemption by undermining a nationwide environmental regulatory program.

Although Movants do not here seek the entry of a money judgment against Kaiser, Movants do seek to enforce the clean-up of the Utah Properties. The United States District Court for Colorado stated with approval in Standard Metals that Congress intended that such enforcement of the environmental protection statutes be excepted from the automatic stay provisions. As a policy consideration, the Court found that staying the government's authority to assess fines for violation of such statutes would do little to further the public interest in environmental protection. That same consideration may be asserted here in support of Movant's request for relief. If those who excavate coal for commercial sale know that the government's authority to enforce the reclamation obligation will be stayed by filing for bankruptcy, they will have little incentive to reclaim once the coal resource has been substantially depleted.

Reclamation, like all environmental protection, is an expensive undertaking and one which provides little or no profit to the operator. By 1978, when the Bankruptcy Reform Act was

> bility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily. (Emphasis supplied.)

Adherence to congressional intent is well illustrated in the case of Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984). In that case the Court of Appeals for the Sixth Circuit considered the application of the Ohio Motor Vehicle Financial Responsibility Act in light of 525(a). The Ohio Act suspends the driver's license of any person who fails to satisfy an auto-accident related judgment within thirty days after demand unless he provides proof of financial responsibility by filing a certificate of insurance, a surety bond, certificate of deposit, or a certificate of self-insurance. The Debtors claimed discrimination within the meaning of 525(a) because Ohio law required them to post proof of financial responsibility "solely" because they had not paid a debt dischargeable in bankruptcy. In rejecting that argument, the Court stated:

> The Duffeys would have us hold that the Ohio Motor Vehicle Financial Responsibility Act violates section 525 because the Act fails to treat a bankrupt as though he or she had never incurred a dischargeable, accident-related tort judgment. Under such an interpretation, once a judgment is discharged or stayed, states would be absolutely prohibited from imposing or continuing any burden, whether a reaffirmation of liability or the imposition of financial responsibility requirements. We believe that this reads more into section 525 than Congress intended.

As the district court correctly noted:

> [N]either the language of the statute nor its legislative history indicates that section 525 was intended by Congress to erase all traces of a discharged debt and thereby foreclose the imposition of any future responsibility requirements. To the contrary, the legislative history of section 525 contemplates both the consideration of the circumstances surrounding bankruptcy and the valid imposition of future financial responsibility requirements.

Duffy v. Dollison, No. C-2-81-1154, slip op. at 10 (S.D. Ohio Aug. 13, 1982). This conclusion is amply supported by the legislative history. Senate Report 989 specifically observes that section 525 "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily." S.Rep. No. 989, supra, at 81, 1978 U.S.Code Cong. & Ad.New at 5867 (emphasis added). House Report No. 595 makes this point even more emphatically:

> [T]he prohibition [of section 525] does not extend so far as to prohibit examination of the factors surrounding bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability.... [I]n those cases where the causes of a bankruptcy are intimately connected with the license, grant, or employment in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy.

H.R.Rep. No. 595, 95th Cong. 1st Sess. 165

reprinted in 1978 U.S.Code Cong. & Ad. News 5963, 6126 (emphasis added). Thus, Congress has evinced a clear intent to permit the imposition of financial responsibility requirements, so long as they are not discriminatorily applied to bankrupts. (Emphasis by the Court.)

The Utah self-bonding regulation, UMC 800.23, is a financial responsibility rule which "imposes requirements" akin to "net capital rules". [1] Indeed, it is the failure of Kaiser (acknowledged in its letter of March 25, 1987 - Attachment 4 to Applicants' Motion) to meet these requirements that triggered the demand made by the Division pursuant to the rules for an "adequate substitute bond." Rule UMC 800.23 provides in pertinent part as follows:

> B. The Division may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant ...:
>
> * * *
>
> 3. The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria: ...
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> * * *

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[1] The term "Net Capital Rule" is commonly used to refer to the financial responsibility requirements imposed on broker-dealers under SEC Rule 15c3-1. Like the Utah Self Bonding Rule UMC 800.23, 15c3-1 specifies a maximum ratio of indebtedness to net worth. Net worth as adjusted pursuant to Rule 15c3-1 is referred to therein as "Net Captial". 17 C.F.R. 240.15c3-1.

(ii) the applicant has a tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less and a ratio of current assets to current liabilities of 1.2 times or greater; or

(iii) the applicant's fixed assets in the United States total at least $20 million and the applicant has a ratio of total liabilities to net worth of 2.5 times or less and a ratio of current assets to current liabilities of 1.2 times or greater.

The Rule further provides that "... if at any time during the period when a self-bond is posted, the financial condition of the applicant ... change(s) so that the criteria of paragraphs B(3) ... of this section are not satisfied, the permittee shall notify the Division immediately and shall within 90 days post an alternate form of bond in the same amount as the self-bond." Rule UMC 800.16E provides that in the event the permittee fails to post "an adequate substitute bond" it is required to cease coal extraction and to immediately commence reclamation operations in accordance with the reclamation plan. Mining operations shall not resume until an acceptable bond has been posted.

The purpose of the bond is to assure the Division and OSMRE that Kaiser will be financially able to perform its reclamation responsibilities when called upon to do so in the future. As noted by the courts in the Penn Terra and Gregory

cases discussed above, an injunction requiring the Debtor to discharge its reclamation responsibilities "... is not intended to compensate for past injuries but to prevent future harm to, and to restore, the environment."

A fair reading of the applicable statutes and rules makes it plain that these requirements apply to any applicant or permittee engaged in the extraction of coal within the State of Utah. The following statement by the Court in Dollison, supra, has particular application here:

> Thereafter, neither payment of the debt, reaffirmation, nor bankruptcy can relieve the debtor of this requirement. Judgment debtors such as the Duffeys who seek relief under the bankruptcy laws are therefore treated no differently from any other judgment debtor. Indeed it is this lack of discrimination to which the Duffeys take exception. By arguing that bankrupts who have proved to be irresponsible drivers should be excused from the requirement of posting proof of financial responsibility, the Duffeys in effect ask this court "to go beyond the fresh start policy of Perez and ... give a debtor a head start over persons who are able to satisfy their unpaid judgment debts without resort to a discharge in Bankruptcy." In re Cerney, 17 B.R. 221, 225 (Bkrtcy.N.D. Ohio 192). We do not believe that section 525 was intended by Congress to afford debtors in bankruptcy such preferential treatment.

In Rees, supra, the court also considered whether imposition of the higher tax rate discriminated against Rees by reason of his status as a debtor. The court concluded that it did not, stating as follows:

As an alternative basis for its ruling today, this Court holds that imposition of the higher tax rate is not discriminatory treatment against the debtor resulting solely from his recourse to the bankruptcy laws.

In giving meaning to the concept of nondiscriminatory application, which lies at the heart of § 525(a), the Court must examine the operation and effect of the Wyoming statute. See In re William Tell II, Inc. 38 B.R. 327, 330, 11 C.B.C2d 235 (Bkrtcy. N.D. Ill. 1983). It is apparent from the face of the statute that W. S. § 27-3-503(b) applies to debtors and nondebtors alike. The criterion for assigning the higher tax rate is failure to pay the amount due by the September 30 deadline. It does not matter whether the employer is or has been a debtor or a bankrupt, whether it has been associated with one, whether it is or has been insolvent, or has not paid a dischargeable debt. This Court therefore concludes that W.S. §27-3-503(b) is being applied non-discriminatorily and is consistent with Section 525(a). (Emphasis supplied).

Congress considered many alternatives to preserve the effectiveness of a debtor's fresh start. During the legislative process, the broadly worded protection against "discriminatory treatment" originally found in Section 4-508 of the Commission bill gave way to the much narrower enumeration found in Section 525(a). Neither the language nor the legislative history of that subsection support a finding of unlawful discrimination on the facts of this case.

In Exquisito Services, Inc., supra, the Court of Appeals for the Fifth Circuit stated the principle as follows:

> These courts have generally required proof that the discrimination was caused solely by the debtor's status, holding that only differentiation between debtor and non-debtor is precluded by the statute.
>
> * * *
>
> Further authority for a narrow reading of § 525 is found in Congress's emphasis that the section "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily." Senate Report at 5867. Only discrimination based solely on the debtor's status is precluded. (Emphasis supplied.

Under the statutes and rules applicable to Kaiser's bonding and reclamation requirements, the sole criterion is whether Kaiser can meet the financial responsibility requirements imposed thereunder. These provisions apply across the board without any differentiation between a debtor or non-debtor under the Bankruptcy Code.

III. CONCLUSION

In conclusion, then, it is clear that Movants are not subject to the automatic stay provisions of § 362(b)(4) and (5) nor is the injunctive relief sought discriminatory under

525(a). Accordingly, Movants request that this Court find that Movants actions to enforce the state and federal environmental laws are not stayed by the provisions of §362(a).

Respectfully submitted this _____ day of April, 1988.

MOYE, GILES, O'KEEFE,
VERMEIRE & GORRELL

JOHN O'BRIEN
1225 17th Street
29th Floor
Denver, CO 80202

DAVID L. WILKINSON
Utah Attorney General

Barbara W. Roberts

BARBARA W. ROBERTS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1017

X

WATKISS & CAMPBELL

HERSCHEL J. SAPERSTEIN
GLEN E. DAVIES
Special Assistants Attorney General
310 South Main Street
Twelfth Floor
Salt Lake City, Utah 84101-2171
(801) 363-3300

ROBERT MILLER
United States Attorney General

DAHIL GOSS
Assistant United States Attorney
1961 Stout Street
Federal Office Building
Suite 1200
Denver, Colorado 80294
(303) 844-2064
FTS 564-2064

STUART A. SANDERSON
Department of Interior
Office of the Regional Solicitor
P.O. Box 25007
Denver Federal Center
Denver, Colorado 80225
(303) 236-8443
FTS 776-8443